Supreme Court, U.S.
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No. 92-1377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT IAN SHERMAN, for himself and as natural guardian for RICHARD HARRY SHERMAN, a minor son,

Petitioners,

v.

COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21 OF WHEELING TOWNSHIP, LLOYD DESCARPENTRIE, School District Superintendent, and DR. FERNE GARRETT, Principal of Riley School, individually and as representatives of the State of Illinois, and ROLAND W. BURRIS, Attorney General of the State of Illinois,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT ROLAND W. BURRIS, ATTORNEY GENERAL OF THE STATE OF ILLINOIS

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LIST OF PARTIES

The parties to the proceedings below were the petitioners, Robert Ian Sherman, for himself and as natural guardian for Richard Harry Sherman, a minor son, and the respondents, Community Consolidated School District 21 of Wheeling Township, Lloyd Descarpentrie, School District Superintendent, Dr. Ferne Garrett, Principal of Riley School, individually and as representatives of the State of Illinois, and Roland W. Burris, Attorney General of the State of Illinois.[1]

[1] The petitioners did not list Roland W. Burris, Attorney General of the State of Illinois, as a party to the proceedings below or as a respondent before this Court. Rule 12.4 provides that any party to the proceeding whose judgment is sought to be reviewed is deemed a party. Rule 14.1(b) further provides that the petition is to include a list of all parties to the proceeding below. Further, the petitioners failed to serve the Illinois Attorney General with the petition, which draws the constitutionality of a state statute into question, in violation of Rule 29.4(c).

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT ROLAND W. BURRIS, ATTORNEY GENERAL OF THE STATE OF ILLINOIS

The respondent, Roland W. Burris, Attorney General of the State of Illinois, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit, decided on November 20, 1992.

STATUTORY PROVISIONS

105 ILCS 5/27-3 (1992) (Ill. Rev. Stat. 1991, ch. 122, par. 27-3)[2]

§ 27-3. Patriotism and principles of representative government—Proper use of flag—Method of voting—Pledge of Allegiance. American patriotism and the principles of representative government, as enunciated in the American Declaration of Independence, the Constitution of the United States of America, and the Constitution of the State of Illinois, and the proper use and display of the American flag, shall be taught in all public schools and other educational institutions supported or maintained in whole or in part by public funds. No student shall receive a certificate of graduation without passing a satisfactory examination upon such subjects.

Instruction shall be given in all such schools and institutions in the method of voting at elections by means of the Australian Ballot system and the method of the counting of votes for candidates.

The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds.

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[2] Pursuant to P.A. 87-1005, § 5.04, eff. January 20, 1993, the Illinois Supreme Court enacted New Rule 6, requiring citation to the new Illinois Compiled Statutes (ILCS). New Rule 6 provides that prior to January 1, 1997, statutory citations may be made to the Illinois Revised Statutes instead of or in addition to the Illinois Compiled Statutes.

STATEMENT OF THE CASE

Plaintiffs, Robert Ian Sherman and Richard Harry Sherman ("the Shermans"),[3] practicing atheists, brought suit in the United States District Court for the Northern District of Illinois, Eastern Division, on November 1, 1988, against defendants Community Consolidated School Dist. 21 of Wheeling Township, Lloyd Descarpentrie, School District Superintendent, and Dr. Ferne Garrett, Principal of Riley School, individually and as representatives of the State of Illinois ("the School Defendants"), seeking a declaration that a portion of Ill. Rev. Stat. 1989, ch. 122, par. 27-3, requiring the daily recitation of the pledge of allegiance in the elementary schools of the State, is unconstitutional. R. 1.

On July 27, 1989, the Shermans filed a re-amended complaint naming the Attorney General of the State of Illinois as a party defendant,[4] and setting forth two counts: count I for declaratory judgment and count II for damages pursuant to 42 U.S.C. Sections 1983 and 1988. R. 64.

The Shermans' re-amended complaint alleged that the pledge of allegiance statute violates the Establishment Clause of the First Amendment because daily recitation

[3] Upon initiation of the suit, the Society of Separationists, Inc. was listed as a party plaintiff. The Society was dismissed from the suit for lack of standing by the district court. R. 96.

[4] At the time the Shermans filed their Re-Amended Complaint, Neil Hartigan was the Attorney General of the State of Illinois. Neil Hartigan ceased to hold the office of Attorney General of the State of Illinois as of January 14, 1991, when Roland W. Burris succeeded to the office. Therefore, pursuant to Fed. R. App. P. 43(c), Roland W. Burris was automatically substituted as a party.

of the pledge implicates a government sponsorship of a commitment to a belief in a supreme being. *Id.* The Shermans alleged that the Defendants intend to promote religion by requiring the recitation of the pledge of allegiance and that the statute, itself, is intended to further religious ends. *Id.*

The re-amended complaint also alleged that the pledge of allegiance statute violates the Free Exercise Clause of the First Amendment, in that the statute compels an affirmation in a belief and an attitude of mind. *Id.* Further, the Shermans alleged that the statute violates the Equal Protection Clause of the Fourteenth Amendment because it creates a favored class of believers over non-believers without a compelling state interest, infringes upon Richard Sherman's right to be free from religious ceremonies in a place he is required by law to be, and subjects Richard Sherman to the possible imposition of sanctions for non-compliance with the statute. *Id.*

On February 28, 1991, the district court entered its final memorandum opinion and order granting Defendant Attorney General's motion for summary judgment. R. 104; 758 F. Supp. 1244 (N.D. Ill. 1991). The court held that the pledge of allegiance statute does not violate the Establishment Clause, applying the test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). R. 104; 758 F. Supp. at 1246-48. The court found that the text of the statute and its legislative history reveal that the purpose of the pledge law is to teach secular, patriotic values rather than religious values; the primary effect of the statute is to teach students the principles under which our government operates and not to advance any particular religious beliefs; and there was an absence of any excessive entanglement of government with religion. *Id.*

The district court also held that the statute does not violate the Free Exercise Clause, in that the statute does not state that "all" students must recite the pledge of allegiance and does not contain any penalty. R. 104; 758 F. Supp. at 1249. As applied to the Shermans, the court held that the statute does not violate the Free Exercise Clause since Richard Sherman has never been required to participate in the Pledge of Allegiance, nor has he ever been punished or threatened with punishment for his refusal to participate. R. 104; 758 F. Supp. at 1251. The court also held that the statute is not violative of the Equal Protection Clause because it is rationally related to the legitimate state interest of instilling knowledge of, and appreciation for, patriotic values in public school students. R. 104; 758 F. Supp. at 1251.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the district court on November 20, 1992. 980 F.2d 437 (7th Cir. 1992). However, the Seventh Circuit vacated the judgment of the district court with respect to the federal court's jurisdiction over the Illinois Attorney General. 980 F.2d at 440-441. The Seventh Circuit held that the Eleventh Amendment barred the Shermans' claims for declaratory judgment and for damages against the Illinois Attorney General. *Id.*

The Seventh Circuit held that the pledge of allegiance statute did not violate the Free Exercise Clause of the First Amendment. *Id.*, at 443. The court interpreted the statute as requiring school officials to lead a daily recitation of the pledge, rather than compelling pupils to recite the pledge. The court found that this construction was consistent with the preference under Illinois law to resolve any ambiguity in favor of the constitutionality of a statute. *Id.* As the statute was applied to Richard Sherman, the Seventh Circuit held that the statute did not compel Richard to recite the pledge. *Id.*

The Seventh Circuit discussed the social pressure to conform in the public school setting and found that a pupil's exception to the patriotic values taught in the public schools, such as the pledge of allegiance, does not implicate free exercise concerns. *Id.*, at 444-45. The Seventh Circuit refused to extend the reasoning of the school prayer cases to a challenge to the curriculum chosen by school officials, finding that a general assimilation of religion to patriotism and other values would allow challenges to the choice of textbooks, classroom instruction and testing methods in the public schools under the guise of the religion clauses of the First Amendment. 980 F.2d at 444-45.

The Seventh Circuit analyzed the Establishment Clause issue as whether ceremonial references in civic life to a deity are understood as prayer or support for religion. *Id.* The Seventh Circuit considered the intent of the drafters of the First Amendment, the tradition of ceremonial references to a deity, and the Supreme Court's recognition that ceremonial references to God are distinct from religious exercises, in concluding that such references are not deemed to be an establishment of religion. *Id.*

The Seventh Circuit found that application of the *Lemon* test to the Establishment Clause challenge here would not be helpful, since the *Lemon* test was not devised to identify religious activity concealed within a civic exercise. 980 F.2d at 445. Further, the Seventh Circuit found that since the Supreme Court did not adhere to application of the *Lemon* test in deciding the Establishment Clause challenge in *Lee v. Weisman*, ____ U.S. ____, 112 S. Ct. 2649, 102 L. Ed. 2d 467 (1992), the court was not disposed to resolve the Shermans' case by a methodical application of the *Lemon* test. 980 F.2d at 445.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE DECISION BELOW DOES NOT RAISE THE QUESTIONS PRESENTED IN THE PETITION.

The Shermans attempt to demonstrate in their petition that the Seventh Circuit erred in failing to apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to the instant case because both cases involve the Establishment Clause and religion in public education. The Shermans argue that the Seventh Circuit effectively held that *Lemon* is "no longer good law." (p. 7). The Shermans also claim that under this Court's holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the pledge of allegiance statute is unconstitutional on its face.

Contrary to the Shermans' questions presented for review, the Seventh Circuit did not hold that *Lemon* no longer supplies the calculus applicable to Establishment Clause cases, nor did the Seventh Circuit adopt the doctrine of "ceremonial deism" in place of the *Lemon* analysis. Additionally, the Seventh Circuit's construction of the pledge of allegiance statute as non-mandatory comports with this Court's holding in *Barnette*. The Seventh Circuit's decision is not inconsistent with *Lemon*, *Lee* or *Barnette*. Therefore, no reason exists for the grant of certiorari.

A. The Seventh Circuit Did Not Hold That *Lemon v. Kurtzman* No Longer Supplies The Calculus Applicable To Establishment Clause Cases.

The Seventh Circuit analyzed the issue presented by the instant case as whether ceremonial references in civic

life to a deity are understood as a prayer. 980 F.2d at 445. The Seventh Circuit correctly found that the test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine whether a statute which touches upon religion will be found to be permissible under the Establishment Clause "was not devised to identify prayer smuggled into civic exercises, . . .". 980 F.2d at 445. The Seventh Circuit followed this Court's reasoning in *Lee v. Weisman*, ____ U.S. ____, 112 S. Ct. 2649, 102 L. Ed. 2d 467 (1992), where this Court found that it was unnecessary to apply the three-part test set forth in *Lemon* to resolve an Establishment Clause challenge involving the public schools. This Court's recognition that *Lemon* may not provide the appropriate analysis for every case involving the Establishment Clause and the public schools lent support to the Seventh Circuit's conclusion that the *Lemon* test would not be of assistance in resolving the issue in this case. 980 F.2d at 445.

As noted by the Shermans, a fair reading of *Lee v. Weisman* reveals that the opinion did not overrule *Lemon v. Kurtzman*. (p. 8). Thus, the Seventh Circuit's application of *Lee*, rather than *Lemon*, was not a rejection of *Lemon*. 980 F.2d at 445. As in *Lee*, the *Lemon* test simply did not provide the appropriate analysis to determine whether the pledge of allegiance, with its reference to "one Nation under God," is a religious exercise prohibited under the Establishment Clause. The Shermans' attempt to force the pledge of allegiance statute into a formulaic rule is inconsistent with this Court's recognition that the Establishment Clause is not a precise provision capable of ready application. *Lynch v. Donnelly*, 465 U.S. 668, 679-80 (1984).

B. The Seventh Circuit Did Not Adopt The Doctrine Of "Ceremonial Deism" In Place Of The *Lemon* Analysis.

The Shermans argue that the Seventh Circuit held that the ceremonial invocation of a deity will pass constitutional muster under the Establishment Clause if the Founding Fathers sanctioned its use. (p. 8). The Seventh Circuit did not so hold, nor did the Seventh Circuit limit its analysis of the issue to a review of the history of the Establishment Clause. Rather, the Seventh Circuit considered not only the intent of the drafters of the First Amendment, but also the tradition of ceremonial references to a deity in civic life and this Court's recognition of the distinction between ceremonial references to God and religious exercises. It certainly was not error for the Seventh Circuit to follow this Court's implicit approval of the reference to "God" in the pledge of allegiance as not violative of the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962); *Abington School District v. Schempp*, 374 U.S. 203, 303-4 (1963) (Brennan, J., concurring); *id.*, at 306-8 (Goldberg, J., joined by Harlan, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984); *id.*, at 693 (O'Connor, J., concurring); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 602-3 (1989).

Although the Shermans argue that the Seventh Circuit erred in failing to apply the three-part *Lemon* test, the Shermans present no argument that application of the *Lemon* test would have led to a ruling in their favor. The result of this case would have been no different under the *Lemon* analysis.

The purpose of the pledge of allegiance statute is to teach secular patriotic values rather than religious values. The primary effect of the statute is to teach students the

principles under which our government operates and not to advance any particular religious beliefs. The statute does not result in any excessive entanglement of the state with religion. Thus, application of the *Lemon* test to the pledge of allegiance statute leads to the conclusion that the statute does not offend the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

C. The Seventh Circuit Did Not Rewrite An Ambiguous Statute And Construe It As Non-Mandatory Contrary To This Court's Precedents.

The Shermans argue that the language of the pledge of allegiance statute is unambiguous and compulsory and the Seventh Circuit erred in rewriting the statute in order to save it. (pp. 12-14). The Shermans argue that the Seventh Circuit's construction of the statute as non-mandatory conflicts with this Court's holding in *Houston v. Hill*, 482 U.S. 451 (1987), that statutory language that is plain and unambiguous is not susceptible of a limiting construction. The pledge of allegiance statute, however, is not unambiguous with regard to the Shermans' argument that the statute is mandatory, since the statute contains no provision to compel or punish pupils for the failure to recite the pledge of allegiance. It was not inconsistent with *Hill* for the Seventh Circuit to construe the statute as not unconstitutional. *Id.*, at 468.

The Shermans further argue that the Seventh Circuit's construction of the pledge of allegiance statute was erroneous because the statute in unconstitutional on its face, under this Court's holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). However, there is a distinct difference between the pledge of allegiance statute and the regulation construed in *Barnette*, as noted by the Seventh Circuit. 980 F.2d at 442-45.

In *Barnette*, the school board adopted a resolution that refusal to recite the pledge of allegiance would be regarded as insubordination and would subject the pupil to disciplinary action. In the Shermans' case, the pledge of allegiance statute does not contain the compulsion and punishment found to be offensive to the First Amendment in *Barnette*. Therefore, the pledge of allegiance statute is not unconstitutional under this Court's holding in *Barnette*.

The questions presented for review do not reflect the Seventh Circuit's holding in this case. Therefore, the decision below does not present a conflict with any applicable decision of this Court and the petition for a writ of certiorari should be denied.

II.

THE FACTS OF THIS CASE DO NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

The Shermans argue that the pledge of allegiance statute is unconstitutional, whether or not the statute mandates recital by pupils, because the statute infringes upon the pupils' constitutional right to "freedom of conscience from subtle coercive pressure." (p. 15). However, the Shermans complained below that the pledge of allegiance statute was unconstitutional because of its mandatory religious nature, not because of any particular sensibilities of young pupils. R. 64. The Shermans have now shifted the focus of their argument to a plea for the protection of young pupils from social and peer pressure to participate in a classroom exercise unacceptable to the pupils' political, religious or philosophical beliefs. Thus, the question raised in the Shermans' petition of whether the pledge of allegiance is unconstitutional, regardless of its mandatory nature, was not

presented below. Neither the record nor the decision below supports the grant of certiorari on the question presented by the petition.

The Shermans' Free Exercise argument was limited below to challenging the pledge of allegiance statute as facially overbroad because it requires compulsory recitation of the pledge of allegiance. Therefore, the Seventh Circuit's opinion analyzed the compulsory nature of the statute. The Seventh Circuit did not just focus on the statute's lack of a penalty or the evidence that Richard was never compelled to recite the pledge. The Seventh Circuit also considered the social pressure and sense of exclusion a pupil would experience in refusing to participate in the group recitation of the pledge of allegiance. 980 F.2d at 443-5. The Seventh Circuit recognized, however, that the protections afforded by the First Amendment's religion clauses do not extend to non-religious speech. 980 F.2d at 444. Thus, the curricula set by the public schools to transmit majoritarian virtues and values may be offensive to some pupils, but inclusion of such values as patriotism is not violative of the First Amendment. 980 F.2d at 444-45.

Additionally, the facts of this case did not reveal that Richard Sherman ever felt coerced or pressured to recite the pledge of allegiance. To the contrary, the facts of this case showed that Richard was never compelled to recite the pledge of allegiance, to place his hand over his heart, to stand or to leave the classroom while other pupils recited the pledge. R. 62, affidavits of the School Defendants attached. The absence of compulsion led the Seventh Circuit to conclude that the pledge of allegiance statute, on its face and as applied, does not violate the Establishment Clause. 980 F.2d at 442-45.

The Shermans argue that this case presents the important federal question, yet to be decided by this Court, of the constitutionality of civic rituals which invoke a deity. (p. 14). However, the issue presented by the Shermans' complaint below was not so broad and, therefore, was not decided by the Seventh Circuit. Regardless, the question the Shermans present in their petition has been answered in numerous cases wherein this Court has indicated its implicit approval of the pledge of allegiance. *See Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962); *Abington School District v. Schempp*, 374 U.S. 203, 303-4 (1963) (Brennan, J., concurring); *id.*, at 306-8 (Goldberg, J., joined by Harlan, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984); *id.*, at 693 (O'Connor, J., concurring); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 602-3 (1989).

The Seventh Circuit held, "so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises." 980 F.2d at 445. Thus, the Seventh Circuit decision was based upon the Shermans' claim that the pledge of allegiance statute required mandatory recitation of the pledge. The Seventh Circuit was not presented with the question raised by the Shermans in their petition of whether the pledge of allegiance statute is unconstitutional regardless of the provision of mandatory recitation.

This Court recognized in *Lee* that the price of conscience or nonconformity may be social isolation or even hostility. 112 S. Ct. at 2661. Absent the pervasiveness of the religious activity involved in *Lee*, this Court indicated that offense taken by the few will not invalidate state action implicating religion. *Id.* Such is the question presented by the Shermans. It has already been answered by this

Court. Therefore, no reason exists to grant the petition for certiorari.

CONCLUSION

For the foregoing reasons, Roland W. Burris, Attorney General of the State of Illinois, respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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